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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

8 In the United States District Court
9 for the Northern District of California

10 ROGER SCHLAFLY, Plaintiff) Case C-94-20512 SW PVT
11 v.) Opposition to PKP Motion
12 PUBLIC KEY PARTNERS, and) on Antitrust Sum. Judg.
13 RSA DATA SECURITY INC., Defendants.) Hon. Spencer Williams
14) 10 am, Aug. 27, 1997
15

16 Schlafly opposes PKP's motion for summary judgment, in its
17 entirety. Before addressing defendants' antitrust arguments, it
18 is necessary to clear up some factual matters.

19 Bidzos Declaration

20 The declaration by D. James Bidzos, president of PKP and RSADSI,
21 is extremely misleading. Para. 10 implies that the terms of PKP
22 licenses were published. In fact, they were not published, and
23 PKP has even withheld the license agreements from Schlafly.
24 Para. 11 implies that he believed in 1990 the Stanford patents to
25 be valid and broad, that the Stanford patents were some sort of
26 threat to RSADSI, and that the formation of PKP was merely an
27 effort to resolve a patent dispute. However, the facts are as
28 follows:

1 * RSADSI knew of the reasons for challenging the Stanford patents
2 back in 1986, as they were described in a patent attorney opinion
3 upon which RSADSI relied.

4
5 * The Stanford/MIT patent dispute was resolved in 1987, and as a
6 result RSADSI received a broad license to the Stanford patents, as
7 well as authority to sublicense them.

8
9 * The formation of PKP in 1990 did not in any way remove any
10 patent infringement threat against RSADSI. Instead, RSADSI gave
11 up certain patent rights in exchange for reducing competition
12 elsewhere in the market.

13
14 These facts have been undisputed in this litigation. Even though
15 Cylink/CKC/Stanford vigorously charged RSADSI with direct and
16 contributory infringement of the Stanford patents, they never
17 suggested that there was any infringement in the 1987-90 period,
18 and based their claims solely on rights that RSADSI voluntarily
19 surrendered in the formation of PKP in 1990. In another
20 declaration, Bidzos said:

21
22 "14. Before the formation of the PKP partnership, RSA also held
23 rights to the Stanford patents. On February 2, 1987, Stanford
24 had granted MIT a "license to Sublicense" the Stanford patents.
25 CKC P.I. Ex. 9. On March 30, 1987, MIT sublicensed RSA to the
26 Stanford Patents in a letter referencing Stanford's February 2,
27 1987 license to MIT. Id. Ex. 10. RSA received the right to
28 make, have made, use, sell and sublicense the Stanford Patents.

1 Id." [Exh. GI]

2
3 Later, in para. 47 of Exh. GI, Bidzos said, "Prior to the
4 formation of PKP, RSA unquestionably had unrestricted rights to
5 the Stanford Patents." An arbitration panel reached the same
6 conclusion:

7
8 "The Panel finds that RSA did have the right to sublicense the
9 Stanford patents prior to April 6, 1990." [Exh. GC, sect.
10 5.(b)(ii)b), p. 14]

11
12 It was with the formation of PKP in 1990 that RSADSI surrendered
13 its patent sublicensing rights to PKP in order that PKP could
14 become the exclusive sublicensing authority for the Stanford and
15 MIT patents, and thereby monopolize public key cryptography.

16
17 In response to a Cylink interrogatory, RSADSI said,

18
19 "At present, RSA intends to rely upon the advice letters
20 already provided [as a defense against an allegation of willful
21 infringement of the Stanford patents] ... D. James Bidzos
22 received copies of the Cushman Darby and Cushman analysis in
23 1986." [Exh. GD] (That analysis is attached as Exh. GH.)

24
25 Because of the facts that the accused infringement was after 1990,
26 that Bidzos received the invalidity/scope analysis in 1986, and
27 that RSADSI relied on the invalidity analysis as a willful
28 infringement defense, it follows that Bidzos and RSADSI believed

1 that the Stanford patents were invalid or of narrow scope when PKP
2 was formed in 1990.

3
4 Thus Mr. Bidzos could not have possibly had a "good faith basis for
5 believing" that the Stanford patents were valid and broad in 1990,
6 and even if he did, PKP could not have possibly been a "good faith
7 solution" to a potential Stanford patent claim against RSADSI.

8
9 Murray Declaration

10
11 Schlafly objects to the Murray declaration as factually inaccurate
12 and based on hearsay. Para. 9 states that the RSA invention was
13 the first practical implementation of asymmetric key cryptography,
14 but it has been undisputed in this case that Diffie and Hellman
15 created one earlier. Para. 10 says that the first asymmetric key
16 products appeared in the early 1990s, but the Bidzos declaration
17 (para. 4) refers to a Lotus product in 1986. There were also other
18 products in the 1980s, such as Crypt Master [Exh. GA, para. 12]
19 and MailSafe [Exh. GI, para. 24]. Para. 11 refers to the
20 "patents" granted to Rivest-Shamir-Adleman, when there is actually
21 only one. Para. 12 refers to the effect of "overlapping patents",
22 but there is no indication that Murray is familiar with the
23 patents or has any patent expertise, and so would not know whether
24 or not the patents are overlapping. Para. 13 expresses an opinion
25 about the motivations of the defendants in 1990, even though
26 Murray was not there at the time, and gives no clue as to how he
27 could have such knowledge. Para. 15 is so vague and ambiguous to
28 be meaningless. Therefore Murray's declaration should be given no

1 weight whatsoever.

2
3 Specific Antitrust Issues

4
5 Schlafly rebuts the PKP arguments below.

6
7 A. Schlafly does not equate a patent with a monopoly in the
8 antitrust sense, as PKP suggests. If the patents were all valid,
9 he would have no objection to Cylink and RSADSI enforcing them. It
10 is the pooling of patents to stifle competition that is the heart
11 of his antitrust claim. Patent pools have been found to be
12 antitrust violations many times, including in the famous Standard
13 Oil case (Standard Oil v. United States, 283 US 163 (1931)). For
14 examples of what is considered lawful and unlawful in this area,
15 see the Antitrust Guidelines for the Licensing of Intellectual
16 Property, issued by the Dept. of Justice and the FTC, supplied
17 here as Exh. GB for the Court's convenience. (Schlafly is making
18 no attempt here to pick and choose favorable quotes from other
19 cases because the guidelines are more useful as a statement of the
20 law. The guidelines are actually more favorable to the defendants
21 than much of the case law.)

22
23 According to a Bidzos declaration [Exh. GI, para. 30], the general
24 purpose of PKP was: "Cylink would produce hardware, RSA would
25 produce software, and the patent interests would be pooled." [Exh.
26 GI, para. 30] This is the worst kind of antitrust patent pool
27 there is. The partners took two horizontally competing
28 technologies, each controlled by patents, pooled them to

1 monopolize a market, and then divided the market among themselves.
2 Even today, 20 years after the Stanford and MIT inventions, all of
3 the popular public key technologies in commercial use today can
4 trace their lineage directly to either the Stanford or MIT
5 inventions. For many applications, the Stanford-based and MIT-
6 based technologies are interchangeable. (See Exh. GA. See also
7 Exh. GE where the MIT-based "RSA" and Stanford-based "DSS" are
8 called the most popular digital signature methods by Bidzos.) An
9 agreement between Stanford and MIT had guaranteed that the patents
10 were not blocking and the technologies could compete in the
11 marketplace. But when the patents were pooled in 1990, PKP itself
12 proclaimed its monopoly by saying, "These patents cover all known
13 methods of practicing the art of Public Key". [Am. Compl. Exh. R]
14 RSADSI's part of the deal was that it got to monopolize
15 cryptography software. According to a Bidzos declaration, "Over
16 the last ten years, the RSA technology has become the de facto
17 standard for encryption technology use on the Internet, and for
18 commercial institutions across the country." [Exh. GI, para. 63]

19
20 B. PKP defends its patent pool on various technicalities, but is
21 unable to give an explanation for how the pool could possibly be
22 pro-competitive. The best it has to offer is a self-serving and
23 unsupported statement by Bidzos that the pool was "intended" to be
24 "convenient and low-cost". If that argument were enough, then
25 every merger would be approved. The fact remains that the patent
26 pool eliminated competition between the Stanford and MIT
27 technologies from the market, and delivered no actual market
28 benefits to which the defendants can point.

1 As one of its technicalities, PKP argues that PKP cannot be a
2 conspiracy, because it is just one entity. However, PKP is a
3 partnership. It is the vehicle by which the partners, RSADSI and
4 Cylink, conspired to control the crypto market.

5
6 Unfortunately, some of the language on the record is a little
7 imprecise on this point. Sometimes Schlafly has said "PKP" when
8 it might have been more precise to say "partners RSADSI and
9 Cylink". The legal distinction between the partners and the
10 partnership is not a sharp one. Practical distinction is further
11 made difficult by the fact that Jim Bidzos was the president of
12 both RSADSI and PKP.

13
14 The point is that RSADSI and Cylink were separate entities who
15 conspired to form PKP, and then RSADSI, Cylink, and PKP all
16 conspired to monopolize the crypto market. Each of these three
17 entities had a separate economic interest. The Copperweld
18 doctrine that a company cannot have an antitrust conspiracy with a
19 wholly-owned subsidiary does not apply.

20
21 C. PKP argues that Schlafly cannot prove patent misuse because
22 defendants did not exaggerate the patents.

23
24 Because of the settlement, Schlafly is no longer asking that the
25 Court judge the Stanford patents to be invalid. However, he still
26 maintains that it was patent misuse for PKP and RSADSI to enforce
27 patents that it believed to be of dubious scope and validity. As
28 explained above, RSADSI knew about the problems with the Stanford

1 patents back in 1986. (Or at least all of the problems except the
2 Diffie-Hellman preprint problem. According to RSADSI in Exh. GD,
3 p. 4, they learned about that problem in 1992. They continued to
4 enforce the patents after 1992.) The patent scope exaggeration
5 allegation also refers to the MIT and Schnorr patents. RSADSI has
6 claimed that the MIT patent covers the "RSA algorithm" (the
7 subject of a parallel motion) and that the Schnorr patent covers
8 the Digital Signature Algorithm (a point which RSADSI recently
9 conceded that there is no such coverage). The latter position was
10 more than "potentially" misleading. RSADSI issued a press release
11 saying,

12
13 "RSA Data Security, Inc. today announced that it is now
14 licensing patents for the Digital Signature Standard (DSS), the
15 U.S. government standard for digital signatures." [Exh. GE,
16 Oct. 12, 1995]

17
18 The press statement is a total lie. There is a patent on DSS (ie,
19 DSA) that PKP had tried to get, and also which RSADSI never got.
20 Cylink argued that the Stanford patents cover DSS, but they were
21 out of RSADSI's control by that date. DSS is not covered by any
22 patents that RSADSI has.

23
24 D. PKP argues that PKP licenses and RSADSI products were sold
25 independently, and therefore could not be tied. Understanding why
26 this argument is wrong requires a deeper understanding of the
27 defendants' businesses. In Exh. GJ, a potential customer wrote to
28 RSADSI asking for prices on an MIT patent license and on RSADSI

1 BSAFE software. The writer had business reasons for getting the
2 patent license and software priced separately, as he explained in
3 his letter. Jim Bidzos rebuffed him, explaining that the license/
4 software pricing alternative is not available from RSADSI. If he
5 had his own software, then he would have to get a patent license
6 from PKP.

7
8 At first glance, this example seems to support defendants'
9 contention that the patent licenses and products are sold
10 separately. But it is actually evidence of tying. RSADSI was in
11 the business of selling two products, patent licenses and
12 software. It normally sold the two together, as a bundle. If
13 someone wanted the patent license without the software, he would
14 be referred to PKP. If someone had a PKP patent license and
15 wanted to buy RSADSI software, he would still have to pay for an
16 RSADSI patent license. Thus the RSADSI patent licenses and
17 software are tied.

18
19 RSADSI might argue that it is under no obligation to sell
20 unbundled patent licenses (ie, patent licenses without software)
21 because a patentee is entitled to use his patent to protect his
22 product line. Indeed, that might be the case if RSADSI never
23 formed PKP to offer patent licenses as a separate product. Once
24 the patent license and the software became distinct products (ie,
25 unbundled), then they cannot be tied back together if the seller
26 has monopoly power in the market.

27
28 RSADSI might also argue that PKP was its patent licensing arm, so

1 there was no need for RSADSI to sell patent licenses without
2 software. But PKP was not selling equivalent patent licenses.
3 PKP patent licenses were difficult to get, and had conditions not
4 present in the patent licenses which accompanied RSADSI software.
5 PKP appears to have existed more to deter patent licenses than to
6 promote patent licenses.

7
8 Now that PKP is no longer issuing patent licenses, RSADSI is
9 apparently offering patent licenses, but the patent license
10 agreement has a specific clause forbidding the customer from
11 buying software from anyone other than RSADSI. (See Exh. GF,
12 discussed in greater detail below.)

13
14 As for whether RSADSI software involves substantial commerce,
15 RSADSI itself estimates that its software is on 75 million
16 computers. (See Exh. GA.) That is substantial.

17
18 E. PKP argues that letters to private organizations, ANSI and
19 IEEE, are somehow excusable under the Noerr-Pennington doctrine.
20 That doctrine shelters petitioning the government, not private
21 industry groups.

22
23 F. PKP has withheld the documents that show the different royalty
24 rates for patent licensees, but then criticize Schlafly for not
25 having the facts. It appears that there are indeed wide
26 disparities, though. The Lemcom license (which has been
27 published) has a royalty of 5% on the net sales of software
28 products, with a minimum per unit. Netscape and Microsoft are

1 both manufacturing and selling licensed products and giving them
2 away free, apparently without paying any royalty or minimum per
3 unit. The AT&T royalty rate is apparently somewhere in between.
4

5 Price discrimination by a patentee can be an antitrust violation
6 if it has an anti-competitive effect in a relevant market. In
7 this case one of the anti-competitive effects is that Netscape and
8 Microsoft can saturate the market with their cryptographic
9 products by giving them away over the Internet, while competitors
10 are saddled with per-unit royalties. The price discrimination by
11 the defendants is more egregious than what is in the cited cases,
12 because (1) defendants pooled patents, and therefore had an
13 obligation to have pro-competitive licensing policies, and (2)
14 defendants publicly promised a nondiscriminatory licensing policy.
15

16 California Unfair Business Act
17

18 Schlafly's allegation that defendants have violated the California
19 Unfair Business Act is based largely on their deceptive patent
20 exaggerations outlined above, and their promise of a reasonable
21 and nondiscriminatory licensing policy.
22

23 RSADSI has been moderately successful in getting its technology
24 adopted in industry standards by claiming a reasonable and
25 nondiscriminatory licensing policy. The various standards groups,
26 such as ANSI and IEEE, require such a policy in the rare cases
27 when they cannot agree on an unpatented technology. RSADSI will
28 no doubt argue that patentees are not required to have any

1 licensing policy at all, much less a reasonable one. But the
2 situation is different when a patentee publicly proclaims to have
3 a reasonable and nondiscriminatory licensing policy, uses that
4 proclamation to get commercial advantages for its products over
5 its competitors, and then fails to live up to that promise.
6 RSADSI's licensing policy is not reasonable because it refuses to
7 license the patent for certain applications which do not fit into
8 its business model. When Schlafly asked RSADSI if he could get a
9 license for a toolkit product, it explained:

10
11 "RSA's basic business is creating toolkit products; that is how
12 we make our living. We ensure that a multitude of end user
13 applications using the patented technology are available by our
14 licensing both toolkits and the patent. We will continue to
15 negotiate licenses that enable others to create end user
16 products in this manner, but we will not license you to make a
17 toolkit product." [Exh. GG, September 18, 1996 letter from
18 Paul O. Livesay, Director of Legal Affairs, RSADSI.]
19

20 This refusal to license toolkits is also expressed in RSADSI's
21 published "Patent License Agreement", which was posted on its web
22 page on February 9, 1996.

23
24 "1.2 "Licensed Product" means ... A Licensed Product may not be
25 a software toolkit product which, for the purposes of this
26 Agreement, shall mean any product consisting of the software
27 modules that can be incorporated into another product, such
28 modules which have as their primary purpose accessing

1 cryptographic algorithms (including, without limitation, public
2 key encryption or decryption, key generator and signature
3 certification) and performing the cryptographic algorithm."

4 [Exh. GF]

5
6 Furthermore, it was not possible for Schlafly's customers to get
7 licenses either. The RSADSI license includes a provision that the
8 licensee not use software from another supplier:

9
10 "2.2 Have Made Rights. All Licensed Products shall be
11 developed, engineered or otherwise created by Licensee.
12 Licensee's "have made" rights granted in Section 2.1 above are
13 limited to include, for production purposes only, the right to
14 authorize one or more third parties to manufacture (in the case
15 of hardware) and/or reproduce (in the case of software)
16 Licensed Products for Sales and distribution thereof, and such
17 "have made" rights otherwise specifically exclude the right to
18 outsource the development of, or acquire from third parties,
19 the Licensed Products." [Exh. GF]

20
21 Thus I cannot make a toolkit product which competes directly with
22 RSADSI's toolkit. I cannot get a patent license for it, and
23 RSADSI patent licensees are prohibited from buying my product.

24
25 RSADSI's licensing policy is also highly discriminatory. Some
26 strategic allies (such as Netscape and Microsoft) pay no
27 royalties, while others (such as Lemcom and its successors) have
28 to pay a per-user royalty.

1 Other California businesses do not behave this way. When a company
2 that claims a reasonable and nondiscriminatory licensing policy
3 and gains a commercial advantage over its competitors by virtue of
4 that claim, it is only fair to expect that company to actually
5 have such a policy. Schlafly contends that PKP and RSADSI have
6 not had such a policy, and therefore maintains his allegation that
7 they are in violation of the California Unfair Business Act.

8
9 Conclusion

10
11 PKP's motion for partial summary judgment is wholly without merit.
12 It's strongest point is that Schlafly does not have all of the
13 evidence assembled regarding defendant's secret licensing
14 agreement, but that is only because the defendants have withheld
15 those documents from discovery. Schlafly has provided ample
16 evidence of unlawful antitrust patent pooling, tying, price
17 discrimination, patent misuse, and unfair business practices. PKP
18 has offered no facts to justify defendants' actions except for the
19 blandest generalities.

20
21 Dated: August 4, 1997

22
23 By:  _____

24 Plaintiff, Roger Schlafly
25
26
27
28